

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 703(e))
of the Telecommunications)
Act of 1996)
)
Amendment of the Commission's)
Rules and Policies Governing)
Pole Attachments)

CS Docket No. 97-151

COMMENTS OF BELL ATLANTIC¹

Bell Atlantic submits these comments in response to the Commission's above-captioned rulemaking to implement Section 224(e) of the Communications Act of 1934. The Notice of Proposed Rulemaking ("NPRM") also raises a number of issues addressed by Bell Atlantic and other commenters in previous proceedings in CS Docket No. 97-98.² Bell Atlantic will not repeat those comments here, in reliance on the Commission's statement that those comments, to the extent they are relevant, will be incorporated by reference in this proceeding.³

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

² See Joint Comments of Bell Atlantic and NYNEX, *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98 (filed June 27, 1997) ("Bell Atlantic Comments"); Joint Reply Comments of Bell Atlantic and NYNEX, *id.* (filed August 11, 1997) ("Bell Atlantic Reply Comments").

³ NPRM para. 8.

I. Third Party Overlapping Requires the Pole Owner's Consent

In the NPRM, the Commission tentatively concluded that telecommunications carriers should be able to overlap their existing lines with additional fiber to build out their facilities, and questioned whether third parties should also be permitted to overlap existing facilities of attaching entities.

Overlapping by both attaching entities and third parties should be permitted on three conditions. First, the pole owner must be given advance notice of, and specifications for, the overlapping in order to evaluate safety considerations, consent to the overlapping, and determine what "make ready" work is required. Because pole owners assume obligations of liability and public safety, they need to have reasonable control to ensure that pole load capacities and access demands do not conflict with one another. Second, where a third party seeks to overlap to an existing attacher's facility, the existing attacher must consent to the overlapping. Third, a third party overlayer must enter into a license agreement directly with the pole owner. Only the pole owner has the right to grant access to such third parties, since the existing attacher has only a right of access, not an ownership right, to its attachment space. A license agreement also makes it easier for the pole owner to bill and collect directly from the third party overlayer for its fair share of the unusable costs of the pole. Finally, a direct license agreement ensures that the pole owner knows to whom it must give advance notice of expected facility modifications.

II. Attaching Entities Should Be Permitted to Lease Dark Fiber

There is a distinction between allowing attaching entities to permit third parties to overlap to their facilities and to sublease use of dark fiber. Bell Atlantic opposes permitting third parties to overlap to attaching entities' facilities without the pole owner's consent because

third parties have only a right of access, not a right of ownership, with regard to the pole or conduit facility. In contrast, the attaching entity does have an ownership interest in its own fiber facilities and should not require the consent of the pole or conduit owner before subleasing its dark fiber to third parties. Moreover, a third party's use of that dark fiber to provide cable or telecommunications services does not place any additional physical load on the pole or conduit. As a result, the Commission should permit attaching entities to sublease their dark fiber to third parties.

If a cable operator leases its dark fiber (or bandwidth within their existing cable facilities) to an entity providing telecommunications services, however, the cable operator should be reclassified as a provider of telecommunications services and pay the telecommunications services rate under Section 224(e) rather than the cable services rate under Section 224(d). Absent such a requirement, cable operators could evade the differential pricing requirements of the Act. In order to ensure that cable operators pay appropriate rates, the Commission should require that they give advance notice to the pole or conduit owner before leasing dark fiber for non-cable services.

Under the Act, entities providing telecommunications services must contribute to both the usable and other than usable space costs;⁴ cable operators providing only cable service need not contribute to the costs of the other than usable space.⁵ As a result, a cable operator may have an incentive to mischaracterize its dark fiber lessees' services as cable rather than telecommunications in order to continue to obtain lower attachment rates. To counterbalance that incentive, the Commission should require cable operators to pay to the pole or conduit

⁴ 47 U.S.C. Sect. 224(e)(1)-(3).

⁵ 47 U.S.C. Sect. 224(d).

owner the higher telecommunications attachment rate, with interest, retroactively to the date of the initial lease of the dark fiber if the cable operator has mischaracterized a third party's use of its dark fiber as to provide cable rather than telecommunications services.

III. The Commission Should Utilize a Gross, Rather Than Net, Book Methodology in Allocating the Costs of Usable and Non-usable Space

For the reasons discussed in detail in Bell Atlantic's previous comments in CS Docket No. 97-98,⁶ the Commission should adopt a gross book cost methodology, with certain modifications, for allocating the costs of usable space. This approach more fully ensures that attachment rates will be "just and reasonable," because the current formula, based on net book costs, results in unusually low or even negative pole attachment rates for some carriers. The gross book methodology is also easier to administer, and is more transparent to attaching entities because it is based on publicly available ARMIS data.

The gross, rather than net, book cost methodology should also be used for allocating the costs of other than usable space. Application of a single rate formula based on publicly available ARMIS data for both usable and non-usable space cost allocation will simplify determination and administration of rates, promote certainty, eliminate the problem of negative net salvage values and reduce the likelihood of rate disputes.

IV. Every Attaching Entity Should Contribute Equally to Unusable Space Costs

The Telecommunications Act of 1996 requires the costs of usable space to be allocated based on the percentage of usable space required by each attaching entity⁷ and, for

⁶ See Bell Atlantic Comments at 3-7.

⁷ 47 U.S.C. Section 224(e)(3). For this reason, the Commission may not adopt Duquesne Light's suggestion that usable space costs be allocated based on the load capacity imposed by a particular attachment, rather than the physical space it occupies. See NPRM para.

providers of telecommunications services, requires an equal apportionment of the costs of other than usable space among all attaching entities.⁸ Because overlashed facilities do not require any space on a pole in addition to the space taken by the existing attachment, no additional fee should be assessed to parties who overlash or permit others to overlash to their attachments. In contrast, in order to comply with the Act's requirement that all attaching entities contribute equally to the costs of the other than usable space, the Commission must require all attaching entities – including third parties overlashing to existing attachments – to pay their share of such costs. Like other attaching entities, overlashing parties share the benefits of not having to purchase and maintain their own pole facilities; as a result, they should contribute equally to the common costs of the other than usable space.

The Commission may not, however, require incumbent local exchange carriers (ILECs) to count themselves as attaching entities for purposes of allocating the costs of other than usable space unless it also treats ILECs as attaching entities for all purposes under Section 224.⁹ As the Commission correctly observes, the Act defines a “pole attachment” as “any attachment by a cable television system or a provider of telecommunications service,”¹⁰ but specifically exempts incumbent local exchange carriers from the definition of a

18. In its previous comments, Bell Atlantic addressed the issues concerning the presumptions underlying the Commission's pole attachment rate formula that are raised in paras. 16-20 of the NPRM.

⁸ 47 U.S.C. Section 224(e)(2). Other than usable space for poles encompasses the portion of the pole buried below ground and space in which attachments may not be placed due to safety considerations. Although Section 224(e)(2) requires an equal allocation of the costs of such other than usable space “among all attaching entities,” Section 224(e) does not govern rates to be paid by cable companies that provide only cable service. *See* 47 U.S.C. Section 224(d). As a result, it would appear that the other than usable space costs may not be allocated to cable companies that provide only cable services.

⁹ NPRM para. 23.

¹⁰ 47 U.S.C. Section 224(a)(4).

telecommunications carrier.¹¹ Since the Commission has determined that ILECs do not enjoy the protections afforded all other attaching entities under Section 224,¹² then it must exclude them from the count of attaching entities among whom the costs of other than usable space must be allocated.¹³

In any event, the Commission may not treat ILECs as attaching entities for purposes of allocating the costs of other than usable space, but not other pole owners such as electric utility companies. Yet that is precisely what the Commission proposes to do.¹⁴ There is no justification under the Act or on public policy grounds for such disparate treatment of pole owners. Similarly, the Commission's request for comments on apportioning the costs of other than usable space "on a proportion of space occupied basis" is inappropriate. The Act clearly requires that the cost of such space be allocated based on "an equal apportionment of such costs among all attaching entities."¹⁵ The Commission has no authority to adopt any other methodology.

The Commission should not require pole and conduit owners to bear the costs of attachments made by government agencies.¹⁶ The costs of attachment or conduit space used by government agencies should instead be categorized as other than usable space, because such space is exclusively set aside for public safety purposes (such as police and fire department use

¹¹ 47 U.S.C. Section 224(a)(5).

¹² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dkt Nos. 96-98 and 95-185, FCC 96-325 (rel. Aug. 8, 1996) at paras. 1119, 1156, n. 2830 ("Interconnection Order").

¹³ Excluding ILECs from the definition of attaching entities for purposes of allocating the costs of 2/3 of the other than usable space under Section 224(e)(2) would not be unfair to other attaching entities since the pole owner(s) must bear the remaining 1/3 of such costs.

¹⁴ See NPRM para. 23.

¹⁵ See 47 U.S.C. Section 224(e)(2).

¹⁶ NPRM para. 24.

or for traffic signaling equipment). All attaching entities should bear the costs of such space because each of them would be required to set aside comparable space if they had to build their own facilities, rather than being permitted to attach to existing facilities. Since all attaching entities benefit from the pole or conduit owner's accommodation of this public interest obligation, they should bear the costs equally.

Finally, Bell Atlantic agrees with the Commission that a pole-by-pole inventory of the number of attaching entities would be prohibitively expensive to administer. Presumptive averages should be developed by pole owners, who already have the data, rather than by the Commission, which would have to expend public and administrative resources to conduct surveys.

Pole owners should be permitted to develop such presumptive averages, however, on a more individualized basis than for their entire service area. For example, large incumbent LECs may find that calculating presumptive averages on a state-by-state basis more accurately captures the differences in competitive demand for access to pole and conduit facilities throughout its service area. In fact, some carriers may find it even more accurate to calculate different presumptive averages within each state for urban, suburban and rural areas. The level of granularity a pole or conduit owner deems appropriate for calculating such averages should be left to its discretion, subject to review for reasonableness upon a complaint by a state commission or, if the state commission has not chosen to regulate attachment rates, by the Commission.

V. The Conduit Rate Formula Should Parallel the Formula for Pole Rates

For reasons explained more fully in Bell Atlantic's previous comments in CS Docket 97-98,¹⁷ the Commission should adopt its proposed half-duct methodology for conduit access rates for usable space but should use gross, rather than, net book costs in the calculation.

With regard to conduit rates for "other than usable" space, the Commission should define that phrase as encompassing all spare or excess capacity not actually being used by the conduit owner or any attaching entity. As Bell Atlantic noted in its previous comments in CS Docket 97-98, "[g]iven the relatively high initial costs and sensitive civic considerations associated with opening underground facilities, the long design life of these facilities requires telephone companies to forecast and install the number of ducts sufficient to meet anticipated needs for growth and maintenance."¹⁸ Thus individual duct costs are kept down over time by prudent investment in spare duct capacity to meet projected demand. All occupants of the conduit system benefit from the ability to expand capacity without the expense and disruption of repeatedly obtaining municipal permits to open roads and municipal rights-of-way to add capacity later. Other than usable space should also be defined to include maintenance ducts reserved for temporary use by any attaching entity in the event of an emergency. Finally, ducts reserved for municipal use (if required) are not usable space. Reservation of such facilities is usually a condition for placing the conduit in the municipal right-of-way. Because all attaching entities benefit from not having to place their own conduit and reserve their own duct for municipal use, it is fair that all should share the costs of reserved municipal ducts.

¹⁷ Bell Atlantic Comments at pp. 2-7 and 12-13.

¹⁸ Bell Atlantic Comments at 12-13.

As with pole attachments, Section 224(e)(2) requires the costs of such spare or common unusable conduit space to be equally apportioned among all attaching entities. The costs of such space should be determined by subtracting from the total cost of the conduit facility the costs associated with the space currently being utilized by the conduit owner or any attaching entity. The remaining space would constitute "other than usable" space, the cost of which would be equally apportioned among all attaching entities. As with pole attachments, the Commission should allow conduit owners to establish a presumptive average number of attaching parties per conduit system in a given area (whether per state, per service area or any smaller geographic area) for purposes of allocating such other than usable costs. Such presumptions would, of course, be subject to rebuttal by a complainant in a complaint proceeding.

VI. Rights-of-Way Complaints Should be Addressed on a Case-By-Case Basis

The Commission should not adopt any particular formula or methodology for determining just and reasonable rates for access to rights-of-way in this proceeding. As the Commission observes, it has had only limited experience with rights-of-way issues.¹⁹ The same is true with regard to the industry. Given that limited experience, it would be difficult to determine the full range of circumstances that would have to be taken into account in establishing such a formula or methodology. Bell Atlantic urges the Commission to address any right-of-way complaints on a case-by-case basis, and revisit the question of rate methodology, if necessary, once the Commission and the industry have broader experience with these issues.

Moreover, unlike poles and conduits which are owned by local utility companies, rights-of-way are often granted under agreements to such utility companies only for their own


¹⁹ NPRM at para. 42.

use. In many circumstances, the utility companies may not legally be able to grant access to such rights-of-way to third parties.²⁰ The landowner may instead require the third party to enter into an access agreement directly with the landowner. As the Commission acknowledged in the Interconnection Order,²¹ conduit owners may not be required to give third parties any right of access to a right-of-way if the landowner has not authorized the pole or conduit owner to do so.

Conclusion

The Commission should adopt pole and conduit rate formulas to implement Section 224 of the Communications Act of 1934 that are consistent with Bell Atlantic's comments above and in CS Docket No. 97-98.

Respectfully submitted,



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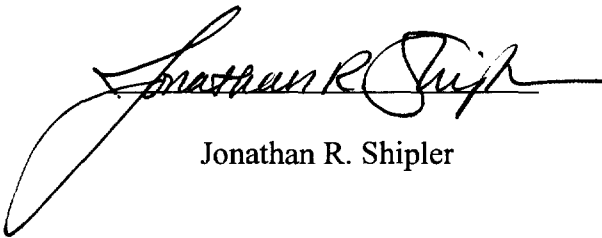
Dated: September 26, 1997

²⁰ The Commission has not yet acted on petitions to reconsider its decision in the Interconnection Order, para. 1181, requiring incumbent local exchange carriers to exercise their powers of eminent domain to provide rights-of-way for the benefit of competing carriers. As the United States Telephone Association pointed out in its petition, whether a LEC may lawfully use its powers of eminent domain for the benefit of third parties is a question of state law.

²¹ Interconnection Order at para. 1179.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 1997, a copy of the foregoing
“Comments of Bell Atlantic” was served by first class U.S. mail, postage prepaid, on the parties
listed on the attached service list.

A handwritten signature in black ink, appearing to read "Jonathan R. Shipler", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

* BY HAND

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